

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12020-mg

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## **6 | In the Matter of:**

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**8 | RESIDENTIAL CAPITAL, LLC, et al.,**

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**10** | **Debtors.**

11

13

14 United States Bankruptcy Court

## 15 One Bowling Green

16 New York, New York

17

18 | October 8, 2015

19 | Page

20

21 | BEFORE:

22 HON. MARTIN GLENN

23 U.S. BANKRUPTCY JUDGE

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2 Status conference re: claim of Rhonda Gosselin.

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4 Hearing re: motion of the ResCap Liquidating Trust for an order  
5 enforcing plan injunction and confirmation order. (CC: Doc#  
6 8947, 8948, 8949, 9078, 9079, 9082, 9083, 9084, 9086).

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1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: All right, please be seated. Good  
4 morning, everybody. We're going to take first Residential  
5 Capital, 12-12020. We're going to hear first the status  
6 conference regarding the Rhonda Gosselin claim. Who's going to  
7 argue for the trust?

8 No one?

9 Is anyone on the telephone for Rhonda Gosselin?

10 THE COURTCALL OPERATOR: And that live attorney has  
11 not dialed in yet, Your Honor.

12 THE COURT: Okay. Don't know why. No one's here on  
13 behalf of the ResCap Borrowers' Trust?

14 I don't understand it.

15 Okay. Let's go on to the ResCap Liquidating Trust's  
16 motion for an order enforcing the plan injunction and  
17 confirmation order. Yeah, I guess I have the list of  
18 appearances in front of me, so we'll just begin.

19 MR. SCHECK: Good morning, Your Honor. Matthew Scheck  
20 from Quinn Emanuel, on behalf of the ResCap Liquidating Trust.

21 THE COURT: Okay.

22 MR. SCHECK: And this is the trust's motion to enforce  
23 the bar-date order, the plan injunction and the confirmation  
24 order, to enjoin certain claims being asserted by Decision One,  
25 PHH, Honor Bank, and Sierra Pacific, against RFC and the trust,

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1 in Minnesota District Court.

2 As Your Honor knows, these bankruptcy cases are  
3 complex and involve thousands of creditors and claims. The  
4 debtors in this court established a process for creditors to  
5 assert their claims against the debtors, and all creditors  
6 holding a claim were subject to that same process and the same  
7 rules. The holder of any claim against a debtor, including  
8 contingent and unmatured claims, was required to file a proof  
9 of claim to assert and preserve its rights.

10 It is undisputed that under that process, claimants  
11 received notice at every step of these bankruptcy cases,  
12 including notice of the bankruptcy filing, the bar date, the  
13 disclosure statement, the plan, and the confirmation hearing.  
14 It is also undisputed the claimants did nothing in response:  
15 they did not file proofs of claim; they did not object to  
16 confirmation of the plan. And to the extent the claimants are  
17 arguing that the pre-petition contracts they claim RFC breached  
18 are executory contracts, those contracts were rejected by the  
19 plan and claimants did not file any claim for rejection  
20 damages.

21 THE COURT: What's your position with respect to  
22 whether those contracts were executory contracts?

23 MR. SCHECK: I'm sorry, Your Honor?

24 THE COURT: What is your position with respect to  
25 whether those contracts were executory contracts?

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1 MR. SCHECK: We do not -- we certainly don't concede  
2 that they were executory --

3 THE COURT: Could you tell me what your position is,  
4 whether your position is that they were executory contracts?

5 MR. SCHECK: Our position is that they were not  
6 executory contracts but, to the extent that they were, they  
7 were rejected by the plan.

8 THE COURT: Go ahead.

9 MR. SCHECK: Your Honor, Claimants are sophisticated  
10 financial institutions; they sold more than eleven billion  
11 dollars in loans to RFC, pursuant to the very pre-petition  
12 contracts they are now suing on. Decision One itself sold  
13 nearly 8 billion dollars in loans, and none of the claimants  
14 sold less than 190 million dollars in loans.

15 THE COURT: Can you tell me whether the debtors or the  
16 trust pre-confirmation served demand letters on any of these  
17 four defendants, with respect to alleged breaches of  
18 representations and warranties or indemnification?

19 MR. SCHECK: I do not know whether demand letters were  
20 served, and that is something that's ongoing in discovery, in  
21 terms of which notices were served, repurchase requests, and  
22 communications between the parties. But I do not, standing  
23 here today, know whether the debtors pre-confirmation served  
24 demand notices.

25 THE COURT: Were repurchase requests served on these

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1 four defendants pre-confirmation?

2 MR. SCHECK: With respect to the loans that are the  
3 subject of this lawsuit?

4 THE COURT: Yes.

5 MR. SCHECK: There may have been some repurchase  
6 requests --

7 THE COURT: Do you know whether --

8 MR. SCHECK: -- but I don't know one way or another.

9 THE COURT: Have you tried to find out?

10 MR. SCHECK: Whether re --

11 THE COURT: Yes. Do you know, with respect to the  
12 loans that are in suit in Minnesota for these four defendants,  
13 whether the debtors served repurchase demands on the defendants  
14 pre-confirmation?

15 MR. SCHECK: No, Your Honor, the only thing that we  
16 know is that the loans -- there are losses on those loans  
17 outstanding that weren't --

18 THE COURT: Have you --

19 MR. SCHECK: -- repurchased.

20 THE COURT: -- investigated whether any demands were  
21 served on these four defendants, with respect to the loans in  
22 suit, pre-confirmation?

23 MR. SCHECK: That investigation is ongoing, but we  
24 don't know the answer as we stand here today.

25 THE COURT: So there is an investigation ongoing and

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1 so far you have not found evidence of any demand on these four  
2 defendants, with respect to the loans in suit, is that correct?

3 MR. SCHECK: Well, that's part of the ongoing --

4 THE COURT: Could you answer my question?

5 MR. SCHECK: -- discovery, so that is -- that is  
6 correct, Your Honor.

7 THE COURT: Okay. Go ahead.

8 MR. SCHECK: Your Honor, Claimants are not  
9 unsuspecting tort victims or unknown creditors that did not  
10 receive any of the notices in these bankruptcy cases. And it's  
11 not unreasonable to require or expect claimants to file proofs  
12 of claim asserting their rights under pre-petition contracts,  
13 including contingent claims.

14 THE COURT: Well, look, let's get down to the issues  
15 that are squarely raised here. First let me ask, with respect  
16 to these four defendants, with respect to which defendants did  
17 the contracts with RFC include prevailing-party attorney's-fee  
18 clauses?

19 MR. SCHECK: Decision One. With respect to Decision  
20 One, there was a prevailing-party attorney's-fee clause. And I  
21 believe, with respect to Sierra Pacific, there was a  
22 prevailing-party's attorney's-fee clause under the settlement  
23 agreement, which is the pre-petition contract at issue.

24 THE COURT: And what about as to the other two  
25 defendants?

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1 MR. SCHECK: As to the other two defendants, they are  
2 only asserting claims for breach of contract and they are  
3 asserting attorney's fees as damages.

4 THE COURT: So then as to the other two defendants,  
5 you know of no prevailing-party attorney's-fee clause in any of  
6 their contracts, is that correct?

7 MR. SCHECK: I do not, and they have not asserted any.

8 THE COURT: Okay. Go ahead.

9 MR. SCHECK: Your Honor, claimants cannot dispute that  
10 the bar-date order, the plan and the confirmation order are  
11 binding on them and that they expressly bar any claims arising  
12 prior to the effective date. Instead, claimants argue that  
13 their claims are not pre-petition claims but, rather, arose  
14 after the effective date. But that is incorrect as a matter of  
15 well-established Second Circuit law.

16 THE COURT: Well, let me ask you about that. So let  
17 me refer to --

18 MR. JENKINS: Pardon me. It's -- Your Honor,  
19 apologies. Jonathan Jenkins appearing via CourtCall, on behalf  
20 of Sierra Pacific. The CourtCall operator just instructed me  
21 to state my appearance on the record.

22 THE COURT: All right.

23 MR. JENKINS: I apologize for the interruption.

24 THE COURT: Thank you.

25 All right, Mr. Scheck, I want to ask you about Judge

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1 Hardin's decision in Texaco, 254 B.R. 536 (Bankr. S.D.N.Y.  
2 2000). At page 559 Judge Hardin states the following: "It is  
3 not surprising that no court has ever held that future claims  
4 for possible future breaches of contract constitute 'claims'  
5 under Section 101(5) that must be filed pre-confirmation.  
6 Neither Sanders nor Chateaugay nor any of the other decisions  
7 relied upon by Texaco involved discharge of a future contract  
8 claim. Indeed, this Court expressly declined to rule on  
9 contract claims in Sanders." I'll leave out the cites. "See  
10 also, this Court's analysis in Wolverine," I'll leave out the  
11 cite, "which held that post-confirmation pricing claims were  
12 not barred, even though based upon the same allegedly erroneous  
13 pricing formula that Texaco had established pre-confirmation.

14 "Simply stated, the basic rule is that claims arising  
15 after confirmation from a contractual relationship are not  
16 barred by a confirmation order. It is only where the liability  
17 asserted in a claim is based upon a breach of contract that  
18 occurred before confirmation that the claim must be filed in  
19 the bankruptcy. Potential claims for liabilities for breach of  
20 obligations which might occur after confirmation cannot be  
21 filed before confirmation even if they could be anticipated."

22 Why doesn't that decision from one of my former  
23 colleagues in the Texaco case apply equally in the  
24 circumstances of this case?

25 MR. SCHECK: Your Honor, in that case the contracts

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1 were neither assumed nor rejected, and Judge Hardin  
2 specifically held that they rode through the bankruptcy.

3 THE COURT: Well, he has a lengthy discussion about  
4 assumption, rejection, and the contracts riding through  
5 bankruptcy. But it seemed to me -- well, let me put it this  
6 way, and I'm going to certainly ask the other side about this:  
7 it did not appear to me that the discussion that I just quoted,  
8 at page 559, depended upon whether the contracts were executory  
9 or not, the point being that if the liability asserted in a  
10 claim is based upon a breach of contract that occurred before  
11 confirmation, it needs to be filed in the bankruptcy; and if it  
12 arises from a breach after confirmation, it can't be filed in  
13 the bankruptcy. And it would follow that that post-  
14 confirmation breach wouldn't be discharged. Why is that wrong?

15 MR. SCHECK: Well, Your Honor, it really had to have  
16 been based on the fact that the contracts were in fact assumed  
17 and the parties were operating under those contracts, because  
18 otherwise it is inconsistent with Second Circuit law that came  
19 prior to it and after. In fact, the Bradlees Stores decision  
20 held, and this is an exact quote, "[T]he Second Circuit  
21 recognizes that contract-based claims are deemed to arise at  
22 the time the contract is executed, and therefore a post-  
23 petition breach of a pre-petition contract gives rise solely to  
24 a pre-petition claim." That's an exact quote from the Bradlees  
25 Store decision from the Southern District of New York, in our

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1 reply.

2 And, Your Honor, that makes sense because at the very  
3 moment that RFC and the claimants executed the contract, that  
4 gave rise to certain rights to payment. And one of those  
5 rights to payment was a contingent right to payment that was  
6 contingent upon the other party --

7 THE COURT: So --

8 MR. SCHECK: -- breaching.

9 THE COURT: -- you expect -- if a contract -- let's  
10 just focus on a contract that has a prevailing-party  
11 attorney's-fee clause. No litigation has been commenced pre-  
12 confirmation, and your position is that while a debtor  
13 successor can sue for breach of that contract, the prevailing-  
14 party attorney's-fee clause is -- any obligation from that is  
15 discharged?

16 MR. SCHECK: Yes, Your Honor --

17 THE COURT: Is that your position?

18 MR. SCHECK: -- it is discharged --

19 THE COURT: You have any case -- there's no case --  
20 would you agree there's no case in the Second Circuit -- from  
21 the Second Circuit, district court, or a bankruptcy court in  
22 the Second Circuit, that's held that a prevailing-party  
23 attorney's-fee clause in a pre-petition contract is dischar --  
24 the obligation from that is discharged, where the debtor  
25 successor, here the trust, brings a post-confirmation action?

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1 There is no case in the Second Circuit, do you agree?

2 MR. SCHECK: Your Honor, there's no case going either  
3 way in the Second Circuit --

4 THE COURT: Okay.

5 MR. SCHECK: -- that's clear.

6 THE COURT: But there is in the Ninth Circuit and the  
7 Seventh Circuit?

8 MR. SCHECK: That's correct, but the Second Circuit  
9 cases are very clear that the rule is that any contractual  
10 claim arising out of a pre-petition contract was a contingent  
11 claim --

12 THE COURT: None of those cases --

13 MR. SCHECK: -- at the time it was executed.

14 THE COURT: -- involved any circumstance similar to  
15 the one that's posited here, correct?

16 MR. SCHECK: Well, Your Honor, it all --

17 THE COURT: Yes or no?

18 MR. SCHECK: It depends whether you're talking about a  
19 breach or a prevailing-parties clause. With respect to --

20 THE COURT: I'm focusing right now --

21 MR. SCHECK: Okay.

22 THE COURT: -- on the prevailing-party attorney's-fee  
23 clause.

24 MR. SCHECK: None of those cases address prevailing-  
25 parties' attorney's-fee clause, but I would submit --

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1 THE COURT: Nothing even close to a prevailing-party  
2 attorney's-fee clause. You want to be able to bring suit,  
3 which you did, post-confirmation, based on a contract that  
4 contained a prevailing-party attorney's-fee clause, and say,  
5 well, that's too bad, we can sue, if they win it's too bad,  
6 they can't recover their attorney's fees. That's your  
7 position? That's not the position one of your partners took in  
8 Minnesota, is that correct?

9 MR. SCHECK: Well, no, one of the partners in  
10 Minnesota -- I think you're referring to Mr. Calamari in a --

11 THE COURT: I am.

12 MR. SCHECK: -- transcript. And all he said was that  
13 the trust had the funds necessary if attorney's fees were  
14 awarded, but not that it would not have potential defenses,  
15 including under the Bankruptcy Code, to any such claim.

16 THE COURT: So you think that I'm bound by -- which  
17 decision in the Second Circuit do you believe I'm bound by that  
18 would cause me to disregard the rulings of the Seventh and  
19 Ninth Circuit, with respect to prevailing-party attorney's-fee  
20 clauses?

21 MR. SCHECK: Your Honor, in the Second Circuit, the  
22 Manville case -- it was cited in our motion -- states that --  
23 an indemnity claim there arose pre-petition "upon the signing  
24 of the indemnity agreements".

25 THE COURT: Yes, but an indemnity claim -- that's not

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1 involved here; there's no issue about an indemnity claim here.  
2 And I would fully agree that indemnity or contribution is a  
3 contingent claim that would need to be asserted by a proof of  
4 claim in the bankruptcy case. That's not this case. Agreed?

5 MR. SCHECK: Agreed, but, Your Honor, the Second  
6 Circuit's rule is clear regarding purely contractual claims.  
7 These are still purely contractual claims arising out of a  
8 contract. And Congress was --

9 THE COURT: Was it in the contemplation of these --

10 MR. SCHECK: Your Honor --

11 THE COURT: Stop. Don't interrupt.

12 MR. SCHECK: Sorry, Your Honor.

13 THE COURT: Was it within the contemplation of these  
14 parties that the trust was going to turn around and sue them  
15 post-confirmation under the contracts that contained  
16 prevailing-party attorney's-fee clauses?

17 MR. SCHECK: Your Honor, the Pearl case in the  
18 district court, which we cite in both our motion and reply,  
19 states that, with respect to a contract, a breach of that  
20 contract and rights arising out of that contract are within the  
21 contemplation of the parties. And that's why Congress  
22 enacted -- or changed the definition of "claim" in the  
23 Bankruptcy Code, which is to get rid of the uncertainty with  
24 respect to the provability of claims. And what that did --  
25 Congress specifically said in the legislative history that they

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1 were including within "claim" any claim no matter how  
2 contingent or remote.

3 THE COURT: Still has to be -- I thought the Second  
4 Circuit case law still focuses on -- it has to be within the  
5 contemplation of the parties; that's, I think, the term that's  
6 been -- the phrase that's been used. It has to be something  
7 that would have been within the contemplation of the parties.  
8 But where it's the trust, the post-confirmation trust brings  
9 the lawsuit. That's why I ask you the question do you have any  
10 evidence that the pre-confirmation debtors made a demand on any  
11 of these defendants for repurchase of the loans. And you told  
12 me you know of no such demand having been made. That was  
13 exactly why I asked to see whether you'd have an argument that  
14 it was within the contemplation of the parties that such a  
15 lawsuit that was filed post-confirmation would be filed.

16 MR. SCHECK: Your Honor, I understand the test to be  
17 within the presumed or actual contemplation of the parties at  
18 the time the contract was entered. And it doesn't relate to  
19 specifically what exact contractual right is in question but  
20 whether the party will breach the contract or whether the party  
21 will take action that gives rise to rights under the contract.

22 THE COURT: So what about -- you would agree that the  
23 trust succeeded to the rights of the debtor, whatever they  
24 were, at the time the confirmation -- at the time the plan can  
25 be effective, correct?

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1 MR. SCHECK: Yes, Your Honor.

2 THE COURT: And so with respect to one of these four  
3 defendants, the settlements that had been entered into -- I  
4 think you said Sierra Pacific?

5 MR. SCHECK: Yes, Your Honor.

6 THE COURT: -- had a covenant not to sue?

7 MR. SCHECK: Yes, Your Honor.

8 THE COURT: And the covenant not to sue becomes a  
9 nullity upon confirmation, that you can go ahead and sue  
10 despite the covenant not to sue, and any claim arising from the  
11 covenant not to sue has been discharged?

12 MR. SCHECK: Well, Your Honor, our position is that to  
13 preserve that claim and any contingent rights under the  
14 contract, Sierra Pacific, or whatever claimant it may be,  
15 should file a proof of claim.

16 THE COURT: So when they enter into a settlement,  
17 which is what they did, and it included a covenant not to sue,  
18 are they supposed to think that, oh, they're going to go ahead  
19 and breach that contract and sue us anyway? Is that what  
20 your -- that's your position?

21 MR. SCHECK: Well, Your Honor --

22 THE COURT: That was supposed to be within the  
23 contemplation of the parties at the time they enter into a  
24 settlement agreement that includes a covenant not to sue, that,  
25 hmm, maybe my counterparty to this contract will ignore the

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1 express contractual covenant not to sue, that it's agreed, and  
2 turn around right after confirmation and sue me anyway? That's  
3 your position?

4 MR. SCHECK: I believe that's the position of the  
5 Southern District of New York in the --

6 THE COURT: You think so?

7 MR. SCHECK: -- Pearl case, but --

8 THE COURT: Point me to a case that would support that  
9 proposition.

10 MR. SCHECK: The Pearl case does support that  
11 proposition --

12 THE COURT: Does it really?

13 MR. SCHECK: -- because it supports the proposition  
14 that a breach is always within the presumed --

15 THE COURT: Any breach, no matter what? We don't have  
16 to have any idea of what provision in a contract might be  
17 breached? Any provision of any contract? So the rule you're  
18 stating would mean that any party to any contract must -- when  
19 no claim has been asserted, must nevertheless file a protective  
20 proof of claim and require a court to determine whether what  
21 the -- somebody's going to have to -- I'm going to have to go  
22 through a claim objection and determine what that is? That's  
23 your position?

24 MR. SCHECK: Your Honor, claimants -- it is our  
25 position, because claimants all the time file purely contingent

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1 protective proofs of claim based on --

2 THE COURT: Well, if --

3 MR. SCHECK: -- contracts.

4 THE COURT: -- if I rule in your favor on this  
5 argument, you're guaranteeing that ridiculous claims are going  
6 to be filed, when there's no basis to think -- I mean, your  
7 predecessor-in-interest enters into a contract with a cov --  
8 look, I'm not saying that -- I'm not deciding now whether any  
9 defense or any affirmative claim is valid; that's not an issue  
10 for me. Okay. I'm dealing with -- you agree with that, I take  
11 it?

12 MR. SCHECK: Yes, Your Honor.

13 THE COURT: Okay. But the debtor -- one of the  
14 debtors entered into a contract with Sierra, settling claims,  
15 and including a covenant not to sue, and you inherit -- the  
16 trust inherits the rights of both parties under that contract,  
17 agreed?

18 MR. SCHECK: Yes.

19 THE COURT: Doesn't matter whether it's executory or  
20 not. You agree?

21 MR. SCHECK: Yes, Your Honor.

22 THE COURT: Okay. And the Sierra contract included a  
23 covenant not to sue, and the trust went ahead and sued. And if  
24 a court determines that by suing it breached that contract,  
25 your position is any liability arising from that post-

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1 confirmation breach has been discharged?

2 MR. SCHECK: Your --

3 THE COURT: That's your position?

4 MR. SCHECK: Your Honor, yes, that it is our position,  
5 because the contract was entered into pre-petition and the bar-  
6 date order specifically said --

7 THE COURT: And there's not a single case in this  
8 circuit that has gone as far as you're arguing for.

9 MR. SCHECK: But the Second Circuit, Your Honor, has  
10 created a bright-line rule from purely contractual claims that  
11 arise out of pre-petition contracts. There has not -- there  
12 has been no case either way on the issue of a prevailing-  
13 party's attorney's-fee clause.

14 THE COURT: So when you dissect each of the cases in  
15 this circuit that have found that -- because some of them  
16 involve whether the claim should be a pre-petition unsecured  
17 claim or whether it's a post-petition claim. But did any of  
18 those cases involve the issue of whether a post-confirmation  
19 breach was -- any claim arising from a post-confirmation breach  
20 was discharged?

21 MR. SCHECK: They address -- I believe they address  
22 whether a post-petition breach is discharged.

23 THE COURT: No, I want -- could you answer my  
24 question?

25 MR. SCHECK: Sure.

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1 THE COURT: Look, let's not fence. Listen to my  
2 question --

3 MR. SCHECK: Sure.

4 THE COURT: -- answer my question, and then you can go  
5 on and give a further explanation if you wish. Do you agree  
6 that there's no case from this circuit that determined whether  
7 liability for a post-confirmation breach was discharged?

8 MR. SCHECK: I agree, we have not seen a case from  
9 this circuit.

10 THE COURT: Okay.

11 MR. SCHECK: I agree.

12 THE COURT: All right. All right, now go ahead and  
13 you can give your further expl -- but when I ask a direct  
14 question, I want a direct answer --

15 MR. SCHECK: Understood, Your Honor.

16 THE COURT: -- and then I'll allow you to elaborate.

17 MR. SCHECK: I apologize.

18 THE COURT: So if you want to go ahead and explain, go  
19 ahead.

20 MR. SCHECK: Your Honor, the Second Circuit is still  
21 clear that what matters is that it was pursuant to a pre-  
22 petition contract. The time of the breach, regardless of  
23 whether it was post-petition or otherwise, is not what's  
24 relevant, because it's a purely contractual right. And that's  
25 completely in line with how Congress chose to define "claim" in

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1 the Bankruptcy Code. That was a change from the Bankruptcy  
2 Act, which required provability. And Congress meant to include  
3 every single claim, no matter how remote or contingent. And  
4 these were contingent claims arising under a pre-petition  
5 contract; they aren't based on post-petition tortious activity,  
6 they aren't based on sanctions or fees awarded post-petition  
7 pursuant --

8 THE COURT: I'd like you to address the Ninth Circuit  
9 Siegel and Ybarra cases.

10 MR. SCHECK: Certainly, Your Honor. Your Honor,  
11 Ybarra was not a pre-petition contract case; the fees there  
12 are --

13 THE COURT: Deal with Siegel first; it's a 1998 case  
14 and Ybarra is a 2005. So deal with Siegel first.

15 MR. SCHECK: Sure, Your Honor. Your Honor, in Siegel  
16 there are several important distinctions which we set forth in  
17 our reply brief, and I think they are meaningful distinctions;  
18 one is that -- one distinction, for example: In Siegel, you  
19 had a debtor that got the benefit of the discharge and also had  
20 not objected to the creditors' proofs of claim; those claims  
21 were allowed. And then the debtor, for his own benefit, not  
22 for the benefit of creditors or the estate, went forward and  
23 pursued litigation over the same claims that had just been  
24 allowed by the bankruptcy court, and the Ninth Circuit held  
25 that those were not discharged. Here you have a trust that is

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1 pursuant to the terms of the plan and confirmation order that  
2 gave it the responsibility and right to bring these claims,  
3 bringing them for the benefit of creditors. And we're not  
4 doing so in direct violation -- or -- I'm sorry -- with respect  
5 to claims that have been allowed, there was no claims process  
6 here, because the claimants didn't file proofs of claim. So  
7 that issue is --

8 THE COURT: Why does that bear on whether the  
9 prevailing-party attorney's-fee clause remains effective post-  
10 confirmation?

11 MR. SCHECK: It bears on whether the liability of RFC  
12 or the trust remains --

13 THE COURT: No, but the court found liability on a  
14 prevailing-party attorney's-fee clause, agree?

15 MR. SCHECK: Yes, Your Honor.

16 THE COURT: And the court found that liability on a  
17 prevailing-party attorney's-fee clause was not discharged as  
18 part of the bankruptcy, correct? It would be unfair to do so?

19 MR. SCHECK: Yes, Your Honor.

20 THE COURT: And that same is true in Ybarra, correct?

21 MR. SCHECK: Yes, Your Honor, although that was not  
22 pursuant to an attorney's-fees clause in the contract; that was  
23 by --

24 THE COURT: Statute.

25 MR. SCHECK: -- California statute.

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1 THE COURT: So why would it make a difference whether  
2 it's prevailing-party attorney's-fees by statute versus by  
3 contract, if -- why does that make a difference?

4 MR. SCHECK: Your Honor, because the sanctions award,  
5 for example, in Ybarra, was a post-confirmation sanctions  
6 award, not pursuant to a pre-petition contract; so it didn't  
7 have its grounding in a pre-petition contract, it wasn't a  
8 contingent contractual claim. And the Second Circuit again is  
9 very clear about contingent contractual claims: they arise  
10 when the contract was executed. Whether it be indemnity or  
11 breach of contract, those claims are pursuant to a pre-petition  
12 contract.

13 And to the extent that Siegel says otherwise, because  
14 that is a pre-petition-contract case, we submit that it's  
15 factually distinguishable and so the unfairness factors that  
16 the Ninth Circuit cited are simply not at play here.

17 THE COURT: So --

18 MR. SCHECK: And --

19 THE COURT: -- which is the Seventh Circuit case? Is  
20 it Ruben?

21 MR. SCHECK: The Seventh Circuit case is Ruben.

22 THE COURT: Yeah.

23 MR. SCHECK: And Reuben was also not a pre-petition  
24 contract case, in the sense that the arbitration fees at issue  
25 there did not arise out of a pre-petition contract; they arose

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1 out of the arbitrator's award of attorney's fees post-petition.

2 And in fact --

3 THE COURT: What was the basis for the award of  
4 attorney's fees by the arbitrator?

5 MR. SCHECK: The arbitrator found that Mr. Ruben, who  
6 was the debtor, had actually committed -- well, found that the  
7 acts for which he was being sued, which was under a fraud  
8 theory, had already been compensated but that the plaintiff  
9 shouldn't have to pay the arbitration costs for those claims;  
10 it was a nondischargeable fraud claim. And so it makes sense  
11 that the fees associated with it were also nondischargeable.  
12 And it's also a factor that the Seventh Circuit cited that one  
13 of the reasons for their decision was that the disciplinary  
14 board had actually found that Mr. Ruben had engaged in some of  
15 his fraudulent conduct post-petition and continued to defend  
16 his fraudulent conduct. So that was a factor in the Seventh  
17 Circuit's decision, which they cited specifically. And those  
18 same circumstances are simply not present here.

19 And, Your Honor, that theme runs through the cases  
20 that the claimants cite; they cite the Wuthrich case, which is  
21 a 2015 Northern District of California case, and in that case  
22 the debtor was the sole shareholder of a company and he induced  
23 another company to sell him goods and then didn't pay for the  
24 goods. And they found that he didn't receive a discharge  
25 because (1) the creditor didn't even receive notice of the

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1 bankruptcy at all, which is certainly not the case here; they  
2 received notice at every step. The creditor also supplied  
3 goods post-petition for the benefit of the company and the  
4 shareholder.

5 So all of those cases the defendants -- I'm sorry --  
6 that the claimants rely upon are distinguishable; the unfair  
7 circumstances that were at play there were completely  
8 different. And only the Siegel case and the Sure-Snap case  
9 arose out of pre-petition contracts.

10 THE COURT: Okay, talk about Sure-Snap.

11 MR. SCHECK: Sure. In Sure-Snap it's actually very  
12 similar to Siegel because --

13 THE COURT: It's Eleventh Circuit. Go ahead.

14 MR. SCHECK: Yes. In Sure-Snap, the reorganized  
15 debtor, again on its own behalf, after receiving a discharge,  
16 pursued litigation not for the benefit of creditors but for  
17 itself, and it --

18 THE COURT: This litigation is being pursued for the  
19 benefit of creditors, right? But you standing in the shoes of  
20 the debtor, okay, why does that make a difference?

21 MR. SCHECK: I understand, Your Honor, and on the law  
22 the Ninth Circuit and the Eleventh Circuit cases, since they  
23 cannot be reconciled with the Second Circuit cases on pre-  
24 petition contracts --

25 THE COURT: Well, they can be reconciled, because none

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1 of the Second Circuit cases involved post-confirmation conduct  
2 by the debtor or the debtor successor. So you want me to apply  
3 language in earlier Second Circuit, district court or  
4 bankruptcy court decisions that perfectly proper, as applied to  
5 the facts in those cases -- you want to -- you've acknowledged  
6 that there are no cases from any level court in the Second  
7 Circuit that deal with post-confirmation conduct and whether  
8 the liability for claims based on post-confirmation conduct, at  
9 least not within the reasonable contemplation of the parties  
10 earlier -- you want me to just extend the prior cases in the  
11 Second Circuit to apply here and say that it discharged any  
12 liability?

13 MR. SCHECK: Yes, Your Honor, because the conduct in  
14 question, when it comes to a purely contractual claim as are  
15 being brought here, is the conduct of executing the contract.

16 THE COURT: How was Sierra supposed to -- was it  
17 supposed to presume that allegedly -- I mean, look, with  
18 respect to Sierra, it mostly showed that through amendments of  
19 the pleadings, when there were originally 3,000-and-some-odd  
20 loans in suit, it's now been reduced to 500. But nevertheless,  
21 the litigation continues as the 500. So whether or not -- I  
22 want to make clear, none of my comments are intended to suggest  
23 that there has been an actionable breach of a covenant not to  
24 sue. Okay. I'm asking hypothetical questions. Okay, but  
25 someone later reads this transcript, if I rule in favor -- if I

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1 deny your motion and Judge Nelson subsequently has before her  
2 proceedings regarding Sierra, my questions are really intended  
3 to be hypothetical. Okay?

4 So let's assume that all of the loans in suit were  
5 covered by the prior settlements -- let's take that  
6 hypothetical -- and a covenant not to sue is granted. Was  
7 Sierra supposed to assume during the bankruptcy -- were they  
8 supposed to presume that the debtors or the debtor successor-  
9 in-interest would simply ignore an express covenant not to --  
10 settlement agreement and covenant not to sue, and sue on the  
11 same loans again and, any damages flowing from that, the  
12 liability was discharged? What supports that argument?

13 MR. SCHECK: In the hypothetical, Your Honor, Sierra  
14 is supposed to protect its rights by filing a contingent proof  
15 of claim, which is done all the time.

16 THE COURT: Is it really?

17 MR. SCHECK: Directors and officers file proofs of  
18 claim, even when there's no pre-petition litigation, for  
19 contingent rights to reimbursement, under contracts or under  
20 articles of the company.

21 THE COURT: You think they really do that, when there  
22 hasn't been any threatened or commenced securities litigation  
23 or breach-of-fiduciary-duty litigation? You think that the  
24 former directors, officers, just as a matter of course, file  
25 protective proofs of claim just in case somebody should turn

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1 around and sue me?

2 MR. SCHECK: Certainly, when there's not commenced  
3 litigation, I believe they do, and I believe they did so in  
4 this case. One director -- I actually just yesterday in  
5 searching proofs of claim, public record, looked at a proof of  
6 claim filed against one of the debtors: Proof of Claim 4452.  
7 I'll give a copy to the claimants. And if Your Honor doesn't  
8 mind, I can hand it up.

9 THE COURT: Sure; come on.

10 Thank you.

11 MR. SCHECK: And, Your Honor, this is Proof of Claim  
12 4452 filed against Debtor GMAC Model Home Finance I, LLC, by  
13 Ronald Kravit. And in this proof of claim, if you turn to page  
14 1 of the addendum, in paragraph 5 Mr. Kravit states, "In the  
15 event an action or proceeding is commenced against Claimant,  
16 for which Claimant may have a claim for indemnification under  
17 contract or applicable law, Claimant seeks to preserve such  
18 rights against the debtors and all affiliates and  
19 subsidiaries." And, Your Honor, this is just illustrative that  
20 when you have a contract -- and as I mentioned before, these  
21 parties had contracts pursuant to which they were selling --  
22 they sold billion dollars -- hundreds of million dollars of  
23 loans, with a counterparty that goes into bankruptcy -- you  
24 receive, just as these claimants did, a notice telling you that  
25 you need to file a claim to preserve your rights; and that

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1 includes, under the Bankruptcy Code, contingent claims. And  
2 the Second Circuit's law is clear the contingent claims include  
3 those arising under a pre-petition contract; the second that  
4 contract is executed, there are contingent claims --

5 THE COURT: So it's within -- obviously the debtor or  
6 a successor has no control over what third parties may do. And  
7 you say that same rule ought to apply, they just ought to  
8 presume that whatever the debtor has -- whatever position --  
9 give me a covenant not to sue, settled -- ask you  
10 hypothetically to assume that they settle as to loans, so it  
11 isn't at issue whether it's 500; it's still being disputed --  
12 that unless -- and we're in a contract where by law has a  
13 prevailing-party attorney's-fee provision. You're saying  
14 nevertheless you need to go ahead and file a contingent claim  
15 in order to preserve your rights?

16 MR. SCHECK: Yes, Your Honor. If I under --

17 THE COURT: All right. Let me hear from the other  
18 side, because I got a very heavy calendar this morning. Thank  
19 you very much.

20 MR. SCHECK: Thank you, Your Honor.

21 MR. BLATT: Good morning, Your Honor. David Blatt on  
22 behalf of Decision One. Your Honor asked three times of  
23 counsel whether he can identify any case, in this circuit, that  
24 addressed the issue of post-confirmation conduct by a debtor,  
25 and three times he said he wasn't able to.

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1 THE COURT: But the cases --

2 MR. BLATT: And I would take that one step fur --

3 THE COURT: But, you know, he is correct that the  
4 cases from the Second Circuit, district courts, bankruptcy  
5 courts, use the language about any claims based on a pre-  
6 petition contract --

7 MR. BLATT: And --

8 THE COURT: -- or discharge.

9 MR. BLATT: And the general mantra or principle that  
10 they are invoking is that principle of a post-petition breach  
11 of a pre-petition contract gives rise to a pre-petition claim.  
12 And what I have --

13 THE COURT: Well, it's even -- I mean, at least one  
14 case talks about post-confirmation breach --

15 MR. BLATT: Well, I --

16 THE COURT: -- of a pre-petition contract.

17 MR. BLATT: -- I would say there is no -- actually,  
18 not only is there no case in the Second Circuit, but they're  
19 not able to cite a single case in the country, in which a post-  
20 confirmation conduct by the debtor was held to discharge a pre-  
21 petition contract. There's not a single authority. And as  
22 Your Honor noted, were this court, in this circuit, this  
23 jurisdiction, to rule for Plaintiff in this case, I think it  
24 would actually create a circuit split with the Ninth, the  
25 Eleventh and the --

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1 THE COURT: Well --

2 MR. BLATT: -- Seventh Circuits.

3 THE COURT: -- what a bankruptcy judge does doesn't  
4 create a circuit split, so --

5 MR. BLATT: That's why I said were courts --

6 THE COURT: Were it only so --

7 MR. BLATT: -- in this jurisdiction.

8 THE COURT: -- but, you know, it --

9 MR. BLATT: But it would be --

10 THE COURT: -- doesn't work that way.

11 MR. BLATT: -- it would be unprecedented, and the  
12 reason is that courts have articulated two exceptions to that  
13 general principle, the principle that they're evoking. And the  
14 first exception that the courts of appeals have invoked is they  
15 uniformly hold that when a debtor post-petition chooses to  
16 return to the fray, they're free and clear and they choose to  
17 return to the fray and use a contract as a weapon, it's  
18 perfectly just and within the purposes of bankruptcy law to  
19 allow the same weapon to be used against them. That's the  
20 principle articulated by Siegel; it's the principle articulated  
21 by -- Siegel, Ninth Circuit; Sure-Snap in the Eleventh Circuit.

22 These are the only cases, by the way, that are cited  
23 by either party in a motion, where a debtor post-discharge  
24 pursued litigation, actively pursued litigation, based on a  
25 pre-petition contract. And both allow the fee claims against

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1 the debtor. And the trust tries to distinguish Siegel, but no  
2 distinction addresses that basic principle that when a debtor  
3 engages in a new course of conduct by filing litigation, by  
4 filing a lawsuit post-discharge, it is subject to potential  
5 liability for harm that it causes by that post-discharge  
6 conduct.

7 THE COURT: Mr. Blatt, let me ask you -- because I  
8 asked Mr. Scheck about Judge Hardin's decision in Texaco and I  
9 quoted the language. Part of his answer was, well, that was an  
10 executory contract. What's your position as to whether these  
11 contracts were executory contracts?

12 MR. BLATT: Well, we have not -- and I don't know the  
13 answer to that, Your Honor, because we haven't developed a  
14 position on that, because it's not necessary for this  
15 proceeding.

16 THE COURT: You agree that they were rejected -- if  
17 they were executory contracts, the plan rejected them? They  
18 weren't --

19 MR. BLATT: And --

20 THE COURT: -- expressly assumed and the plan  
21 provided, unless expressly assumed, contracts are rejected?

22 MR. BLATT: That's what they say --

23 THE COURT: Well --

24 MR. BLATT: -- and I can't --

25 THE COURT: -- do you dispute that?

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1 MR. SCHECK: -- I don't -- no, Your Honor, I don't --

2 THE COURT: Okay.

3 MR. BLATT: -- I don't dispute that.

4 THE COURT: All right. So what Judge Hardin said, is  
5 it limited to executory contracts that ride through bankruptcy?

6 MR. BLATT: No. I think the general principle that  
7 courts both in the Seventh and Ninth Circuit and the Eleventh  
8 Circuit and other courts as well, in the district courts -- and  
9 I think counsel referred to the Northern District of California  
10 case, and other district courts, that when there's post-  
11 confirmation conduct by a debtor, that post-confirmation  
12 conduct does not give rise to a pre-petition claim. And that's  
13 the second exception; the first one was, when the debtor  
14 returns to the fray, tries to use the contract as a weapon, it  
15 is within the purposes of the bankruptcy law that the weapon  
16 can be used against it.

17 The second exception is that it does not give rise to  
18 a pre-petition claim when a debtor engages in voluntary, post-  
19 confirmation, affirmative conduct; that's what the Sure-Snap  
20 case held, that's what Wuthrich held, that's what the Spencer  
21 case held. They're not able to cite a single case disputing  
22 that, not one. There's not a single case.

23 And --

24 THE COURT: Let me ask you this: Siegel, Ybarra,  
25 Sure-Snap, they all involved prevailing-party attorney's-fee

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1 clauses?

2 MR. BLATT: Some did, some didn't. Some --

3 THE COURT: Which didn't?

4 MR. BLATT: The Ruben case did not; that was the  
5 arbitration award.

6 THE COURT: Right.

7 MR. BLATT: The Ybarra case, I believe, was a  
8 statutory.

9 THE COURT: Okay. But the --

10 MR. BLATT: And the other two, Sure-Snap and Siegel,  
11 did involve prevailing-party attorney-fee. And what the cases  
12 they cite set forth is in footnote 12 of our opposition brief;  
13 they involve contingencies that are triggered by one of the  
14 three things: they're triggered either by a third party's  
15 actions, not the debtor's; they're triggered by pre-discharge  
16 conduct -- they don't take any dispute with that. We put that  
17 in our brief. They haven't challenged that. And in the reply  
18 brief, they also -- the cases, they involve -- the Texaco case,  
19 the Chrysler case, the Applied Theory, the Drexel, the Caldor,  
20 the Bradlees cases, those involve pre-discharge conduct and  
21 whether they qualify for administrative priority, which is  
22 obviously a different situation here.

23 Their lead cite is the Caldor case; they said it again  
24 today. And the Caldor case was whether a claim arose during  
25 the operating period during the bankruptcy or during the wind-

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1 down period during --

2 THE COURT: I understand that. I understand the  
3 distinction you're drawing. Let me ask a different question.  
4 At least one of these defendants -- maybe all of them; maybe  
5 all the four -- have asserted as a breach the sole-remedy  
6 provision in some of the contracts. And certainly when the  
7 issue was presented to me on a motion to dismiss, I denied a  
8 motion to dismiss, based on the sole-remedy clause in at least  
9 some of the contracts. Did Judge Nelson address that in any  
10 decisions?

11 MR. BLATT: Your Honor, unfortunately I'm not the one  
12 of these four --

13 THE COURT: Well, ask your --

14 MR. BLATT: -- who can answer that --

15 THE COURT: We got a lot of lawyers here, so --

16 MR. BLATT: -- because in the Decision One case, we  
17 actually have a specific --

18 THE COURT: Yes, I know.

19 MR. BLATT: Yes. And so --

20 THE COURT: You have --

21 MR. BLATT: -- we --

22 THE COURT: You tout your unique provision unlike any  
23 of the other contracts.

24 MR. BLATT: To which I heard today that they have no  
25 evidence in which they actually gave an opportunity to

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1 repurchase and cure. And so I actually think that it's a --

2 THE COURT: Well, I'm not so sure about that, but --

3 MR. BLATT: We'll get to -- that's not for this  
4 proceeding.

5 THE COURT: That Judge Nelson can deal with. Can you  
6 ask your colleagues, did Judge Nelson rule on any motions to  
7 dismiss because of the alleged sole-remedy-clauses provision in  
8 contracts?

9 MR. BLATT: I don't think she did -- I'm not aware of  
10 her doing that but --

11 THE COURT: Okay.

12 MR. BLATT: -- if someone knows --

13 THE COURT: But you've already acknowledge that you're  
14 not really --

15 MR. BLATT: I'm not the person to --

16 THE COURT: I know, but you've got other people here  
17 who are involved.

18 MR. STEWART: Your Honor, I'm not aware of any.

19 Chris --

20 THE COURT: You -- okay.

21 MR. STEWART: -- Stewart.

22 THE COURT: Okay, Mr. Stewart. Thank you.

23 MR. BLATT: Now, interesting --

24 THE COURT: So but let me -- but here's my point.

25 Your arguments with respect to the prevailing-party attorney's-

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1 fee clause is -- I'm not deciding anything today, but it's  
2 obviously resonated with me. Okay? And it's consistent with  
3 the Ninth Circuit decisions and the Seventh Circuit decision,  
4 which argue -- whether unfairness is enough to tip the balance,  
5 they argue it would be unfair to allow a debtor or its  
6 successor, post-confirmation, to sue on a contract that had a  
7 prevailing-party attorney's-fee clause, or where there's a  
8 state statute for prevailing-party attorney's-fees, and say oh,  
9 that claim is discharged because you didn't file a proof of  
10 claim. Okay?

11 But I'm not sure that the issue is the same where the  
12 alleged breach, if it was a breach, was that there was a sole-  
13 remedy provision in the contract.

14 You've asserted -- you go out of your way in your  
15 papers to say nothing before the Court now determines -- and  
16 they've said as well, none of this determines what defenses may  
17 be valid defenses to the claims that the Trust has asserted.  
18 But I'm having trouble with where the alleged breach is not of  
19 a prevailing-party attorney's-fee clause. They still have to  
20 prevail in order to -- you still have to prevail in order to  
21 recover under it.

22 Go ahead.

23 MR. BLATT: But Your Honor, I think the clauses stand  
24 on the same footing under the principles articulated by the  
25 cases. By --

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1 THE COURT: No, not the Ninth Circuit cases that --  
2 not the cases that talk about it would be unfair to allow them  
3 to sue on the contract but say that the prevailing-party  
4 attorney's-fee provision is discharged.

5 MR. BLATT: And that certainly was the specific  
6 circumstances in which that arose. But the language of the  
7 court was that it's just and within the purposes of  
8 bankruptcy -- I think the bankruptcy law -- to allow the same  
9 weapon to be used against the debtor who's asserting it.

10 And I don't think that's limited to an attorney fee  
11 provision. If, for instance, they argue --

12 THE COURT: I might feel different -- I feel -- your  
13 argument is stronger with respect to the covenant not to sue,  
14 express promise not to file a lawsuit.

15 MR. BLATT: And that's what we have in Decision One.

16 THE COURT: Now, what you have as to 2,500 loans but  
17 not 500, approximately. Do you agree with that?

18 MR. BLATT: Yes.

19 THE COURT: There are approximately 500 loans that  
20 remain in suit in the Minnesota court. Not for the --

21 UNIDENTIFIED SPEAKER: Your Honor, that was ours.  
22 That was CRO.

23 THE COURT: I'm sorry, that's CRO. I'm sorry.

24 MR. BLATT: May I --

25 THE COURT: Yeah, I only have a few minutes, because

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1 I've got a long calendar of other things this morning, but I'm  
2 going to cut you off soon.

3 MR. BLATT: Okay. Anytime.

4 THE COURT: Sure.

5 MR. BLATT: So the provision --

6 THE COURT: It's usually Mr. Nesser who hands up books  
7 with slides. I can't remember whether Mr. Johnson has done  
8 that before. Probably. Go ahead. I'm sorry.

9 MR. JOHNSON: Maybe. One or two times.

10 THE COURT: I'm sorry, go ahead, Mr. Blatt.

11 MR. BLATT: And this is the provision in the Decision  
12 One contract, that RFC shall not exercise any rights,  
13 remedies -- any other rights and remedies with respect to  
14 Decision One, the client, or any affected loan, unless and  
15 until the client's first been afforded the opportunity to cure  
16 or repurchase such affected loan.

17 THE COURT: Yeah, but in my decision on the motions to  
18 dismiss in this case, I certainly left open the issue whether,  
19 for example, such a clause would bar a claim for  
20 indemnification where they went ahead and settled. So it's  
21 not -- I understand your argument, but I put it on a different  
22 footing than I would either a covenant not to sue or  
23 prevailing-party attorney's-fee clause.

24 MR. BLATT: Well, and Your Honor, there are -- we've  
25 cited multiple cases here that have allowed the claims other

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1 than for attorney fees. In the Wuthrich case it was a claim  
2 for a breach of contract. In the Spencer case it was a claim  
3 for a breach of payment on a condo assessment. Obviously, in  
4 the Siegel case it talks about allowing the weapon to be  
5 used -- the weapon that the debtor uses to be used against it.  
6 There are obviously -- and I know they are distinguishing --  
7 but the Lear case, the O'Loghlin case, the Velo case --

8 THE COURT: I've read everybody's briefs.

9 MR. BLATT: Okay. All right.

10 THE COURT: I'm going to take this matter under  
11 submission.

12 MR. BLATT: Thank you, Your Honor.

13 THE COURT: Thank you very much, Mr. Blatt.

14 MR. BLATT: Okay.

15 THE COURT: All right. Let me ask -- I don't want to  
16 hear any more argument. Is there anyone here for either the  
17 Trust or Gosselin, with respect to what was on the calendar for  
18 a case management conference with respect to the remaining  
19 claims of Rhonda Gosselin?

20 I don't know why they're not here. It's on the  
21 calendar. All right. We're going to take a short recess. My  
22 courtroom deputy has to patch additional people in on  
23 CourtCall.

24 (Recess from 10:52 a.m. until 11:04 a.m.)

25 THE COURT: All right, please be seated.

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1 MR. JOHNSON: Your Honor, just to clarify for --

2 THE COURT: You have to identify yourself.

3 MR. JOHNSON: Sorry. Matt Johnson on behalf of HSBC  
4 Mortgage Corp. Just on behalf of some of the folks that were  
5 here on the ResCap Liquidating Trust litigation. We understand  
6 the motion was finished. We were unclear about whether you're  
7 moving into a new matter --

8 THE COURT: I am.

9 MR. JOHNSON: Okay.

10 THE COURT: I know you had requested a conference.

11 We're going to have to do that by telephone. We'll do it by  
12 telephone. I just -- I've got a full calendar today.

13 MR. JOHNSON: Understood, Your Honor. We were just a  
14 little unclear.

15 THE COURT: And I guess my -- if we were able to  
16 finish by 11 o'clock -- before 11 o'clock, I would have had a  
17 discussion about the issues that remain. What I would suggest  
18 is that the two of you talk with my courtroom deputy, see if  
19 you can work out a convenient -- I know you've got a lot of  
20 other people here who maybe want to be heard as well -- but see  
21 if you can work out a mutually convenient time for a call with  
22 the Court.

23 I typically do those telephone conferences later  
24 afternoon, then everybody can -- somebody just has to arrange a  
25 call-in number.

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1 MR. JOHNSON: Sure.

2 THE COURT: Deanna can give you a date, okay?

3 MR. JOHNSON: Very well.

4 THE COURT: I just am jam-packed today.

5 MR. JOHNSON: Understand. Thank you, Your Honor.

6 THE COURT: Okay? Thanks very much.

7 (Whereupon these proceedings were concluded at 11:05 AM)

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2 C E R T I F I C A T I O N

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4 I, David Rutt, certify that the foregoing transcript is a true  
5 and accurate record of the proceedings.

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